Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-32

FACTS:

You are writing on behalf of an organization (the Organization), a 501(c)(3) corporation under the Internal Revenue Code. The Organization is sponsoring a fundraising dinner. The Organization proposes to sell tickets to the dinner. Each ticket would cost $150. The Organization currently estimates that the actual cost for food and drinks, per ticket, is about $45. The remaining $105 would support other Organization activities.

The Organization wishes to invite several elected and appointed officials to the event, including members of the Legislature and the Executive branch (such as the Secretary of at least one cabinet office). The officials would not be required to pay either the actual $45 meal
cost or the $105 fundraising portion of admission. None of these officials would be asked to participate as a speaker at the event.

The Organization, as a 501(c)(3) corporation, is permitted to engage in lobbying activities. However, those activities are strictly limited by law. You inform us that the Organization does, from time to time, lobby the Legislature and Executive branch on issues of interest to it. You also inform us that you are registered with the Secretary of State's Office as a legislative agent (or "lobbyist") as a result of the Organization's lobbying activities.

QUESTION:

May the Organization invite elected and appointed state officials, with whom it occasionally has official business, to the fundraising dinner without charging them the $150 price of admission?

ANSWER:

No, unless it is clear that the Organization has not had, nor will have, official business before a particular elected or appointed official.

DISCUSSION:

Two questions are relevant to your opinion request. The threshold question concerns whether §3 of c. 268A applies at all to the present facts.[1/] Is the waiver of the admission charge being made "for or because of" some official duty performed or to be performed? Is there, in other words, some official nexus between the Organization and the public officials in question? The second question concerns whether the $150 price of admission constitutes something of "substantial value" where the actual cost of the meal is estimated to be only about $45 and the remainder supports other Organization activities. As discussed below, we answer yes to both of these questions.

"For or Because of"

The Commission has consistently read §3 broadly to effectuate the legislative purpose. As the Commission stated in *In re Michael*, 1981 SEC 59, 68:

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of §3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring §3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial

performance of their duties and permit multiple remuneration for doing what employees are already obliged to do — a good job.

For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. *Public Enforcement Letter 92-1*, at 25 (December 9, 1991). As the Commission explained in *Advisory No. 8 (Free Passes)*:

> [E]ven in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use [his] authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver. In such a case, the gratuity is given for as yet unidentifiable "acts to be performed."

In 1990, the Commission made clear that §3 would apply even where there is evidence of a private social relationship between the donor and donee unless the private relationship is *the* motive for the gift:

> Where a public employee is in a position to take official action concerning matters affecting a party's interest, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if the public employee and the party have a private personal relationship and the employee does not in fact participate in any official matter concerning the party, unless the evidence establishes that the private relationship was the motive for the gift.

In re Ackerly Communications, 1990 SEC 518, 520 n.5.

Thus, where there is a connection — an official nexus — between the giver and the receiver, §3 prohibits the giving of anything of substantial value to the public employee. The Commission has held that the "gift" need not be tangible property. Rather, a "gift" can include such items as free admissions to events for which others must pay. *See Commission Advisory No. 8; EC-COI-92-19*.

Because the Organization has, from time to time, a direct interest in legislative business,[2/] and in other law-making mechanisms before the Executive branch, we conclude that there is a nexus between the Organization and the public officials in question sufficient to implicate §3. The Organization has had, and will likely later have, an interest in matters before these public officials. Only where it is clear that a particular public official is not in a position to use his or her authority in a manner which could affect Organization interests or issues would the waiver of the admission charge not implicate §3. In that case, nothing will have been given "for or because of" any official duty. *See EC-COI-92-19.*

Substantial Value

A second question must also be addressed. Does the waiver of the admission charge constitute "substantial value" to the public official? We conclude that it does.

Substantial value has been held to be anything worth $50 or more. *See, e.g., Commission Advisory No. 8; EC-COI-92-19.* Although the actual cost of the meal may be $45, the Commission has previously determined that it will look first to the face value of a ticket, unless the real value of the ticket far exceeds its printed face value. *See Commission Advisory No. 8; EC-COI-92-19.* The actual cost of admission here has been set at $150. Thus, substantial value is reached in this instance and §3 would prohibit the Organization from waiving the admission fee of any person with whom they have had, or may have, official dealings. *See EC-COI-92-2*.

The Commission could have concluded that, because the actual cost of this event is only the $45 cost of the meal, substantial value is not reached. For example, the Commission might have found that the $105 fundraising portion of the ticket is really a donation to the Organization, not a cost of admission. However, such an approach is incorrect for two reasons. First, we have consistently held that we must first look to the valuation placed on the event (as set by the ticket price, for example). *See, e.g., EC-COI-92-19.* Here, the price of admission is $150. Second, it is clear that *any other* person who wishes to attend the dinner must pay the full $150 cost, not $45 or some other intermediate cost. Other guests cannot simply refuse to make the $105 Organization contribution if

they wish to attend the dinner. Thus we find that substantial value has been reached even though none of the $105 fundraising portion of the ticket would be given to the public officials in question (and thus, perhaps, represents an "intangible" value to him or her).[3/]

This conclusion establishes an objective test of substantial value on these facts. It would prove difficult (if not impossible) to place a subjective value on the worth of attending the Organization dinner or a similar event. Ultimately, the Commission must, in the present case, choose between two values, $45 or $150. Given that other guests must pay the $150 admission price, and that the $45 valuation is little more than an estimate (which could later change), the Commission finds that the proper course in this case is to use the acknowledged higher figure.

Because the present facts indicate that none of the public officials in question would participate in the event (as a speaker, for example), we distinguish prior Commission rulings which suggest a different result if they were to participate. *See, e.g., EC-COI-80-28* (public employees may receive reimbursements for reasonably related speaking expenses, notwithstanding the §3 restrictions); *Commission Advisory No. 2 (Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements)* (legitimate speaking engagement rules); *see also* 5 CFR §2635.204(g) (federal regulations which permit a public employee to accept unsolicited gifts of free attendance at widely-attended events under certain limited conditions).[4/]

Finally, given our conclusion under §3, we need not discuss the application of §23 to your facts.

Date Authorized: October 8, 1992

[1/]Section 3(b) of c. 268A prohibits a public employee (whether state, county, or municipal) from receiving anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him. Section 3(a) has a counterpart provision which applies to the *giver* of substantial value.

"Official act," is defined as any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

"Official responsibility," is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

[2/]In *EC-COI-92-2*, the Commission established a test for what constitutes an "interest in legislative business." The relevant question asks whether the giver has any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus motives for giving include expressing gratitude for past acts or engendering future "good will."

We find that the Organization meets this test because of its occasional lobbying activities.

[3/]If the cost of admission were less than $50, *or if* all other guests were required to pay the actual cost of meals and entertainment only (with donations to the Organization encouraged but not required as part of the admission price), then our conclusion would be different.

[4/]We also note that the conclusion expressed in this opinion would not apply to campaign fundraising activities, including those held by or on behalf of public officials. Those activities appear to raise issues addressed under G.L. c. 55, the Massachusetts campaign finance law. *Cf. EC-COI-92-12* (noting the possible §23[b][2] difference in fundraising activities applicable to elected officials in light of c. 55); *United States v. Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974) ("Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official").